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NO. 74-1424

IN THE UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA
Plaintiff/Appellee

VS.

EDWARD HENRY ASHDOWN and
CHARLES E. GRAHAM, JR.
Defendants/Appellants

NO. 73-3020

UNITED STATES COURT
OF APPEALS

FIFTH CIRCUIT

PETITION FOR WRITS OF CERTIORARI BY EDWARD HENRY ASHDOWN AND CHARLES E. GRAHAM, JR. FROM JUDGMENTS AGAINST THEM RENDERED BY UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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The petition of CHARLES E. GRAHAM, JR., and EDWARD HENRY ASHDOWN for Writs of Certiorari to the Supreme Court of the United States of America, respectfully shows the Court:

1.

Petitioners were each convicted on an eleven-count indictment for alleged violations of 15 U. S. C., Sections 77q and 77x and 18 U. S. C., Section 2. In essence, defendants were indicted for allegedly fraudulent offers for sale through the mails of common stock of Mountain States Development Corporation. The remainder of the counts related to particular individuals who had purchased the shares of stock or refrained from selling on the strength of the mail enclosures.

2.

Prior to trial each defendant filed a Motion for Severance. Both Motions were denied.

3.

Trial was commenced on June 11, 1973, and continued through June 13, 1973. The jury was charged at 2:15 p.m., June 14, 1973 and returned with verdicts of guilty on each count except Count V which had been dismissed by the Court.

4.

On August 14, 1973, Charles E. Graham, Jr., was sentenced to five years on Count I, five years on Counts II, III, IV, VI, VII and VIII to run concurrent with each other but to run consecutive to the sentence imposed on Count I. Sentences of five years were imposed on Counts IX, X and XI to run concurrent with each other and concurrent to the sentences imposed on the other counts. The sentence amounted to a confinement of ten years.

5.

On August 14, 1973, Edward Henry Ashdown was sentenced to five years on Count I, and two years on Counts II, III, IV, VI, VII and VIII to run concurrent with each other but consecutive to the sentence imposed on Count I. A two-year sentence was imposed on Counts IX, X and XI to run concurrent with each other and concurrent to the other sentences imposed. Total confinement would be seven years.

6.

An appeal was timely filed with the Court of Appeals for the Fifth Circuit. On the 17th day of March, 1975, the Court of Appeals rendered a written opinion affirming the conviction and the sentences. The Court's opinion is attached.

7.

Jurisdiction of this Court is sought in this petition because petitioners were convicted of a violation of a United States Statute; namely, 15 U. S. C. 77q and 77x and 18 U. S. C. 2. The conviction was affirmed and a rehearing denied on April 17, 1975.

8.

The questions for review here are the following:

a. The conduct of the prosecutor in final argument to the jury calling defendants, inter alia, thieves, swindlers, etc. (These statements are set out in detail below). Do such statements meet the tests required of a prosecutor in Berger vs. United States 295 U. S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed 1314 (1935)?

b. The failure to disclose information in the files of the IRS that Mr. Graham had income of $45,691 for 1968, while the prosecutor's closing argument led the jury to believe he had profited by some $300,000. Can such evidence be withheld in view of Brady v. Maryland, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)?

c Duplicity in the indictment in that only a single mailing forms the basis of the charges of securities fraud in counts I through IV.

d. Insufficiency of evidence presented against defendant Ashdown. Ashdown's participation was the subject of speculation by the jury and the Court of Appeal but was not sustained by solid credible evidence.

9.

There are no constitutional provisions, treaties, statutes, ordiances, or regulations directly involved in this appeal. This appeal seeks to review only the matters set out in the paragraph above involving the fundamental bases of a fair trial.

10.

Messrs. Graham, as investor, and Ashdown, as broker, sought to merge Graham Oil Company with Mountain States Development Company. The intent was to use the latter company for expansion and development. The merger resulted in an assessment on Mountain States' stock.

11.

The officers and moving parties in Mountain States Development Company, in their search for opportunities, engaged in an agreement to purchase a battery manufacturing plant in Deming, New Mexico in return for a fixed amount of Deming bonds. This transaction was intricately related to the acquisition of Manhattan West Corporation who in turn was to purchase Laser Power Industries of New Mexico.

12.

Mountain States also acquired some mining rights on the Guyape River and on the Almendares River in Honduras. Mr. Graham, acting for the company, concluded a relationship in the nature of a joint adventure with Standard Dredge Company to exploit the claims.

13.

In this kind of context it is impossible to set out all of the facets of these transactions which played a part in the trial. To sustain its position that fraud through the mails was perpetrated, the prosecutor relied on the following documents;

a. A press release prepared by a professional in New York referent to the exploitation of the mining rights in Honduras; and

b. An annual report for Mountain States Development Co., was mailed in 1969 to stockholders.

14.

The trial commenced on Monday, June 11, 1973, and went to the jury June 14, 1973, at 2:15 p.m. Considering that a portion of Monday was spent in picking a jury and opening arguments, and Thursday morning spent in closing arguments and jury charges, the trial was swift, perhaps hectic. Thirty-seven witnesses testified and one hundred twenty exhibits went into evidence. Even the Government in argument acknowledged the trial had been "hectic" and "fast".

15.

Petitioners show that in the atmosphere of a hectic trial with over one hundred exhibits, the prosecutor in final argument

launched a campaign of villification against defendants calculated to inflame the jury and substitute emotion for reason, prejudice for justice. Remarks of the prosecutor included:

"That's the kind of man who swindled the public out of $300,000.00 . . . ."

"He's been double-dealing since last July 17th." (closing argument Tr. 924).

"A bunch of leases that he had been double-dealing with that had very little value, and believe me, there's no difference." (closing argument Tr. 929).

"These people here, these swindlers here . . . ." (closing argument 929).

The grand jury indicted them for "stealing over a half million dollars." (closing argument Tr. 921-922. This is not what the indictment charges them with.)

"And that's why these two thieves are here before you today." (closing argument Tr. 922).

"The Graham Oil Company stock, he pulled a fast one there." (closing argument. This was not supported by any evidence whatsoever.)

"You can go out there and stick a gun in a man's back and hold him up for $300,000.00 and you don't leave a written record about it. If you swindle someone out of it though, you do. You have got to. That's the difference. That's what makes this case easy." (closing argument. This was a deliberately misleading analogy for documentation that was susceptible of more than a single interpretation.)

16.

Petitioners show that it was the Governments contention that defendants conspired to obtain control of a corporation and then subsequently to sell stock through a false and misleading annual report and a false and misleading press release. The Government contended that stockholders were defrauded by purchasing stock or failing to sell their stock because of representations made in the annual report and/or the press release.

17.

The case entailed a sophisticated understanding of business and business communications. It involved looking at corporate transactions over a period of six years. The charges of misrepresentation necessitated a broad and sophisticated understanding of language far better than that possessed by the average person.

18.

The annual report, not prepared by either defendant, was characterized by the prosecutor in the following terms:

> "I don't think it's an overstatement from cover to call this thing a lie. Why do I call it a lie? Well, of course it is." (closing argument, Tr. 875).
>
> "There's no question about it, it's a fraud. It's a lie as Mr. Clark (other prosecutor) said from cover to cover." (closing argument Tr. 930).

19.

The company in which petitioner Graham was an officer and stockholder entered into an agreement to operate and exploit certain mining leases for silver in Honduras. The press release was not prepared by either defendant. Although there was no evidence that Honduras did not contain silver and some evidence (testimony of Graham) that it did, the prosecutor stated to the jury:

> "There is not one piece of evidence in this record that there is any silver anywhere in Honduras, let alone on these two rivers. And believe me, if there was any written evidence of that fact, you would have it here before you." (closing statement, Tr. 925).

Even a basic reference book shows silver as a major product of Honduras.

20.

Such statements to the jury, coupled with references by the prosecutor in cross-examination of Graham not substantiated by the record, did much to prejudice the jury and were far more damaging to these defendants than the statements set out in Jones vs. United States, 338 F. 2d 553 (D. C. Cir. 1964); United States vs. Fearns, 501 F. 2d 486 (7th Cir. 1974); United States vs. Peak, 498 F. 2d 1337 (6th Cir. 1974); United States vs. Stanley, 445 F. 2d 644 (4th Cir. 1972); Wagner vs. United States, 263 F. 2d 877 (5th Cir. 1959). The Wagner case, supra, with United States vs. Socony-Vacuum Oil Co., 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed 1129 (1940), granted reversals without defense having made timely objections.

21.

Petitioners show that such statements converted a courtroom into a judicial circus, put the United States Government

in the role of misrepresenting evidence, facts and burden of proof, of using flamboyant and wildly exaggerated declarations to stampede the jury into a vengeful verdict. In a trial designed to prosecute these defendants for allegedly misrepresenting the business of a company, it is ironical, indeed a travesty on justice, that the major and most flagrant representations occurred from the Government itself to the jury. With such conduct, it must be apparent to anyone that this jury verdict is tainted.

22.

Petitioners show that the United States Government is not an ordinary party to a criminal action; it is a recognized sovereignty vested with the obligation not to win a conviction but to aid in the triumph of justice, to assist in presenting a case in a manner and in an atmosphere where man's reason and intellect, not his prejudice and emotion, govern his most important decisions. That the Government in this case abused its role and misused its power is apparent from even a cursory reading of the closing arguments.

23.

A second ground for reversal concerns the failure to disclose exculpatory evidence. One of the foremost rights guaranteed a defendant by the Constitution is that of due process as set forth in Brady v. Maryland, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed 2d 215 (1963), and later cases following that rationale. A defendant, of course, is entitled to disclosure of all evidence favorable to his side of the case. The Government is held to this standard whether the lawyer actually prosecuting the case is aware of the specific facts or not.

24.

Throughout the trial of this matter, the prosecutors led the jury to believe that these defendants had personally profited by hundreds of thousands of dollars from the transactions alleged. While this was not supported by the evidence in the record, the prosecutors made such statements in arguing to the jury. In closing argument the Government attorney said of Mr. Graham, "That's the kind of man who swindled the public out of $300,000.00 . . ." (Tr. 925). He claimed that the grand jury indicted them for "stealing over a half million dollars." (Tr. 921-922).

25.

Yet recently the Internal Revenue Service rendered its final statement in which it found that Mr. Graham had a tax deficiency of $14,586 in 1968, the year in question, and total income of only $45,691! This is a vastly different picture from the one presented by the Government at the trial.

26.

Accordingly, the information which was in possession of the IRS, flatly contradicting the statements of the prosecutor, should have been furnished to the defendants. It was certainly favorable to them in light of the statements made by the Government counsel. The jury was given an entirely misleading picture, and the Government had evidence in its files to refute it. Failure to produce this evidence is ground for reversal under Brady.

27.

Since this information did not come to the attention of defendants until after the Fifth Circuit had affirmed this matter, this is a new issue that has not been raised previously. We submit that it is a gravely serious issue that merits reversal by this Court.

28.

Furthermore, the indictment in this matter is improperly drawn and violative of defendants' rights in that the same alleged crime is charged in four separate counts. Counts I through IV all depend upon a single mailing of a bundle of annual reports to stockholders. Each of these counts charges that on or about July 26, 1968, defendants

> "did place and cause to be placed in an authorized depository for mail matter a package containing numerous copies of the 1967 annual report of Mountain States Development Company. . . ."

The counts differ only in that a different investor's name appears in each.

29.

It is not the scheme to defraud but use of the mails to execute such a scheme which constitutes the offense under the statute. Munch v. United States, 24 F. 2d 518, 519 (5th Cir. 1928). This has long been the rule in mail fraud cases, as in Munch v. United States, 24 F. 2d 518, 519 (5th Cir. 1928), and

the same rationale applies to securities fraud matters. A separate mailing must be the basis for each separate count. Otherwise, the indictment is duplicitous.

30.

This Court has so held in many areas of federal criminal law. Bell vs. United States, 349 U. S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955); Castle v. United States, 368 U. S. 13, 82 S. Ct. 123, 7 L. Ed 2d 75 (1961), rev. Castle vs. United States, 287 F. 2d 657 (5th Cir. 1968).

Respectfully submitted.

JOHNSTON, THORNTON, PRINGLE & GREER
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CERTIFICATE

I CERTIFY that a copy of the above and foregoing has been mailed to:

Mr. William Sessions
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P. O. Box 74
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Shreveport, Louisiana, May , 1975.

James J. Thornton, Jr.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Edward Henry ASHDOWN and Charles E. Graham, Jr.,
Defendants-Appellants.

No. 73-3020.

United State Court of Appeals,
Fifth Circuit.

March 17, 1975.

George Milman, for Graham.

Donald M. Re, Beverly Hills, Cal., for Ashdown.

William S. Sessions, U. S. Atty., San Antonio, Tex., Ralph E. Harris, Asst. U. S. Atty., El Paso, Tex., Robert G. Clark, Sp. Atty., Dept. of Justice, Washington, D. C., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, and COLEMAN and DYER, Circuit Judges.

DYER, Circuit Judge:

Graham and Ashdown appeal their convictions for securities fraud under 15 U.S.C.A. § 77q(a) and mail fraud under 18 U.S.C.A. § 1341. We affirm.

Both were convicted on ten counts of an eleven-count indictment.[1] All counts involve and incorporate by reference the basic scheme, outlined in Count 1. Graham and Ashdown were charged with employing a scheme to defraud in the offer and sale of common stock in Mountain State Development Co. (Mountain). Counts 1-8 (excluding count 5) each charge specific sales and mailings in violation of 15 U.S.C.A. § 77q(a), fraud in the offer or sale of securities by use of the mails. Counts 9, 10, and 11 incorporate the same scheme, but charge specific mailings in violation of the mail fraud statute, 18 U.S.C.A. § 1341. Thus,

1. The court directed a verdict of acquittal on Count 5 which alleged a telephone conversation in violation of 15 U.S.C.A. § 77q.

proof of a mailing in furtherance of the scheme is an element of each count.

Graham was the architect of the multi-faceted scheme. In July, 1967, he bought a controlling interest in Mountain, the stock of which had an "assessability" feature. The next day, at Graham's instance, Mountain entered into a contract with Graham Oil Company, of which Graham was the general managing partner, to purchase certain oil properties. An assessment of ten cents per share was levied in January, 1968, ostensibly to finance the purchase of the Graham Oil Co. properties. However, some of these properties were subject to prior assignments and liens, a fact which was never disclosed to the shareholders. Mountain received $290,000 from this assessment.

In the same summer, 1967, Mountain acquired two other properties: one, an oil property in Kern County, California, known as the Jones Lease, and the other a small battery company, Laser Power Industries (Laser). Mountain shareholders were informed of these acquisitions by letter.

In the following May, 1968, Mountain sold the assets of Laser to the city of Deming, New Mexico, under an "Industrial Revenue Project." The city used such projects to encourage industrial growth by buying the assets of a company and then leasing them back to an operating company which was to pay substantial rentals to the city. The city in turn would retire the bonds and interest out of that revenue.

The deal between Mountain and the city of Deming was closed on May 14, 1968. Under their arrangement, Mountain sold the assets of Laser to Deming in return for industrial revenue bonds. The Laser assets including equipment, inventory, goodwill, and patents, were then leased to a newly-formed Mountain subsidiary, Laser Power Industries of New Mexico (Laser New Mexico), which was to build a battery plant in Deming and be the operating company. Mountain also assigned the Jones Lease to Laser New Mexico to "reasonably insure" the success of the project.

The important feature of these industrial bonds is that the city incurs no liability whatsoever. If the operating company does not build a plant and operate it in Deming, the revenue bonds have absolutely no value. Yet they were listed in the 1967 Annual Report as "marketable securities." The shareholders were never informed of the city's very limited obligation.

Mountain was headquartered in El Paso, Texas, Graham's home town. It also maintained a Los Angeles office, with which Edward Ashdown became associated in the fall of 1967, and of which he became "office manager" sometime after the first of the year, 1968. It was at this point that Ashdown became an active participant in the scheme.

The day after the deal between Mountain and Deming was closed, May 15, 1968, Graham and Ashdown transferred controlling interest in Laser New Mexico to Manhattan West Corporation, a small corporate venture. However, a shareholder letter and the annual report, both issued subsequent to the deal, listed both the Jones Lease and Laser as assets of Mountain. The Manhattan West deal was never disclosed.

In July, 1968, Mountain bought certain mining claims in Honduras. Graham and Ashdown went to New York where they engaged a public relations specialist to prepare a press release concerning the Honduran property. The release, prepared and made public August 8, stated that Mountain held claims in Honduras and that "independent engineering surveys and test cores drilled in one ten-mile span of river of the working area are assayed to contain recoverable precious metal of gold and silver valued in excess of $25 million." The reports on which this estimate was apparently based, later subpoenaed by the SEC, pertained to an entirely different river, and at any rate, did not justify the named figure.

The primary misrepresentations converning the Deming bonds, the Laser assets, and the Honduran claims, were made in the 1967 annual report, which was distributed in mid-July, 1968, and the August, 1968, press release. Graham was primarily responsible for the preparation of the report, but Ashdown took an active part in its distribution. Both participated in the preparation of the press release. Both Graham and Ashdown traded heavily in Mountain stock, especially after the issuance of the annual report in mid-July and the August 8 press release. Much of Graham's selling was done through nominee accounts by a broker, Poulsen, in Salt Lake City. Both defendants touted the company and the stock to numerous witnesses.

Each defendant claims that, with regard to him, the evidence was insufficient to sustain his conviction. We find on the contrary that there was ample evidence to support the jury's finding that there was a scheme to defraud, that both

defendants participated in the scheme, and that the mails were used in furtherance of the scheme. Indeed, the evidence was overwhelming.

Apart from the question of sufficiency of the evidence as to each, the defendants raise identical claims. Many of their assertions of error are without merit. Those which we deem worthy of discussion will be treated as to both Graham and Ashdown.

I. VENUE

Although at trial, Ashdown moved for severance and a transfer to Los Angeles on the grounds of inconvenience and "in the interests of justice," defendants are here asserting that El Paso was a constitutionally improper venue. They claim that the only connection shown with Texas was the mailing of the annual report, and that the proof was insufficient to indicate that the mailing had anything to do with the scheme. However, the annual report and the misrepresentations it contained were a central part of the scheme. Furthermore, there were a great many other evidentiary connections with El Paso. It was Graham's home. Poulsen, the Salt Lake stock broker, mailed numerous notes regarding the nominee trading he was conducting to Graham in El Paso. He mailed checks to Graham which were deposited in El Paso banks. Graham maintained the headquarters office of Mountain in El Paso. Books were kept there; employees were paid there; the annual report was edited, printed, and mailed from there. In addition, some of the defrauded purchasers resided there. The Constitution requires that the trial shall be held in the state and district wherein the crime was committed. If there was any one scene of this crime, it was Texas.

II. STATUTE OF LIMITATIONS

The scheme alleged in the indictment covered roughly the period from January 1, 1967, through December 31, 1968. The indictment was returned March 30, 1973. The parties agree that the five-year statute of limitations period of 18 U.S.C.A. § 3282 applies. Count 1 of the indictment, which outlines the scheme, includes several incidents which occurred prior to the limitations period. Graham and Ashdown assert that the jury might have based its guilty verdict on one or more of those acts occurring prior to March 30, 1968, evidence of which they contend was

inadmissible.[2] In this contention, they misperceive the law.

The statute of limitations is a defense to prosecution, not a rule of evidence. Therefore, once prosecution is timely instituted, the statute of limitations has no bearing on the admissibility of evidence. It would be a bizarre result indeed if a crime properly prosecuted within the limitations period could not be proven because an essential element, such as intent, could only be established by proof of incidents occurring outside the period.

Here, the evidence which the defendants question helps establish the scheme and the guilty intent. But the crimes alleged in every count are mailings in furtherance of the scheme. All of these mailings occurred within the statutory period; hence, there is no limitations problem. One on-going conspiracy is alleged. Although it began outside the limitations period it ended well within it. It is proper for the jury to infer one conspiracy starting before and ending after the statute of limitations period. United States v. Seuss, 1 Cir. 1973, 474 F.2d 385, cert. denied, 412 U.S. 928, 93 S.Ct. 2751, 37 L.Ed.2d 155. Under similar circumstances, the Tenth Circuit found no statutory bar. In that case, a six-count mail fraud, the defendant made fraudulent representations in advertising letters and circulars. As in this case, the court admitted proof of transactions and events occurring more than five years prior to the indictment. Furthermore, in this case, as in United States v. Blosser, 10 Cir. 1971, 440 F.2d 697, "all uses of the mails shown to prove the offenses charged occurred within the period of the statute of limitations." *Id.* at 699. The evidence "bore on the existence of the scheme to defraud, the falsity of representations made, and intent." *Id.* Therefore, if the prosecution is timely with respect to the mailings alleged,

> [i]t is no defense that the scheme was formed earlier, and proof running back of the statute is admissible to show the scheme and intent if it is connected up with the scheme existing when use of the mails occurred.

Id. See also United States v. Brandom, 8 Cir. 1973, 479 F.2d 830, 831 n. 1. This Court has held that it is not the scheme to defraud, but the use of the mails to execute the scheme which

2. Our review of the record discloses no objection made and no defense raised on the basis of the statute of limitations.

constitutes the offense. Munch v. United States, 5 Cir. 1928, 24 F.2d 518, 519. Thus the prosecution here was timely, as it was within five years of each mailing alleged.

Therefore, there is no merit in the argument that it was error to admit evidence of acts committed beyond the statute of limitations period where the mailing offenses all occurred within the period and the evidence admitted helps establish the scheme.

III. THE MAILINGS

Graham and Ashdown raise numerous claims with respect to the various mailings alleged in the indictment. These claims fall into two general categories: 1) whether the mailings were adequately proven, and 2) whether the mailings were sufficiently related to the scheme to provide a federal jurisdictional base. The mailings variously involve a bulk mailing of the annual report, the mailing of stock certificates and confirmations of purchase, and individual mailings of the annual report after stock was purchased.

A. PROOF OF MAILING

Counts 1-4 allege that individual investors received copies of the 1967 annual report which was mailed in bulk from El Paso to the Mountain office in Los Angeles. Defendants claim that the mailing was not proven. However, there is ample evidence upon which a jury could find that such a mailing was made. The reports were printed in El Paso and delivered to the El Paso office. The secretary testified that they were distributed by mail at Graham's direction. The secretary in the Los Angeles office testified that they received "a couple of stacks" of the reports in the mail for distribution. This evidence leaves little doubt that a package of the reports was mailed from El Paso to Los Angeles. The Los Angeles office, under Ashdown's direction, distributed (in most cases, mailed) individual copies of the report to the investors named in Counts 1-4. Thus, the proof of mailing on these counts was entirely adequate.

B. JURISDICTION

Defendants next contend that the mailings are not sufficiently related to the scheme to defraud to provide jurisdiction. In Counts 6-8, the named investors received either stock certificates or confirmations of stock purchase through the mail. Counts 9-11 allege specific mailings of the annual report which occurred after the initial stock purchases. Defen-

dants challenge these various mailings as insufficient to confer jurisdiction either because reliance by the investor was not shown, or because mailings after the stock sale could not be "for the purpose of executing" the scheme. Both of these arguments fail.

Specific reliance by the investor need not be shown in a prosecution under 15 U.S.C.A. § 77q(a). Rather, what must be shown is that the scheme had an impact on the investor and that the mails were used in employing the scheme. The Seventh Circuit case on which defendants rely states the proper standard:

> [T]he government must show some impact of the scheme on the investor and that the mails were used in those instances where the impact occurred. . . . The mail must be used *in employing* the scheme however incidental the mailings may be.

United States v. Schaefer, 7 Cir. 1962, 299 F.2d 625, 629-30. This standard does not approach a "reliance" requirement.

Here, mailing was a basic part of the scheme. There was ample evidence of the impact of the scheme on the investors in Counts 6-8 to support the guilty verdict. Each received stock certificates or confirmations of purchase in the mail; such a mailing provided the jurisdictional base in McDaniel v. United States, 5 Cir. 1965, 343 F.2d 785. This Court stated in that case that such a use of the mails was "not a mere incidental use" but was an "integral part of the transaction." *Id.* at 787. Furthermore, the testimony of each investor contained sufficient evidence of the scheme's impact on him to support the jury's verdict on these counts. Each was influenced either by the misleading shareholder literature, including the annual report, or by Graham's representations, both direct and indirect.

Counts 6-11 are all challenged because the mailing involved occurred after the purchase of stock. As we have already noted, the mailings in Counts 6-8 are sufficiently connected with the scheme under *McDaniel, spura.* Counts 9-11, charging mail fraud under 18 U.S.C.A. § 1341, were all predicated upon mailings of the annual report. Each investor in these three courts had already purchased stock before receiving the offending mailing. However, it is a well-established principle of mail fraud law that use of the mails after the money is obtained may nevertheless be "for the purpose of executing" the fraud.

The Supreme Court considered this question in United States v. Sampson, 1962, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d

136, in which salesmen fraudulently obtained applications and advance payments from businessmen and then mailed acceptances to the defrauded victims to lull them into believing the service would be performed. The Court held that such a "lulling" use of the mails was for the purpose of executing the fraudulent scheme. There, as here, the whole scheme contemplated fraudulent activities both before and after payment was received. There is no rule that the money must change hands after the mailing.

The Court recently phrased the test as "whether these mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute." United States v. Maze, 1974, 414 U.S. 395, 399, 94 S.Ct. 645, 648, 38 L.Ed.2d 603. Although in *Maze*, a credit card fraud, the Court found the mailing insufficient, in doing so, it re-affirmed *Sampson*. Thus, post-purchase mailings which are designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are mailings in furtherance of the scheme. United States v. MacClain, 10 Cir. 1974, 501 F.2d 1006, 1012; *see also* United States v. Miles, 8 Cir. 1973, 483 F.2d 1372; United States v. Strauss, 7 Cir. 1971, 452 F.2d 375, 380, cert. denied, 1972, 405 U.S. 989, 92 S.Ct. 1252, 31 L.Ed.2d 455; United States v. Porter, 8 Cir. 1971, 441 F.2d 1204, 1211.

In this case, each of the investors named in Counts 9-11 testified as to the "lulling" effect of the mailing. Receipt of the annual report in the mail was to each a factor, or the significant factor, in his retaining the stock in the belief (later proven false) that he had made a good investment. The lulling mailing was an entirely sufficient jurisdictional base, and the evidence entirely sufficient for conviction on these counts.

IV. SENTENCES

Both defendants were found guilty on all ten counts submitted to the jury. Graham received a five-year sentence on Count 1, plus five years for each remaining count to be served concurrently for a total of ten years imprisonment. Ashdown also received a five-year sentence on Count 1, but only two years concurrently for each remaining count, for a total of seven years imprisonment. Both Graham and Ashdown argue that because one conspiracy is charged and incorporated in all counts, in effect one crime has been committed carrying a maximum sentence of five years, and the sentences should therefore be merged. This argument, too, must fail.

This Court has considered essentially the same question in Sanders v. United States, 5 Cir. 1969, 415 F.2d 621, cert. denied, 397 U.S. 976, 90 S.Ct. 1096, 25 L.Ed.2d 271. That case, too, concerned multiple counts of both mail and securities fraud. In addition, the indictment contained a separate conspiracy count. The defendant in *Sanders* urged that all the counts alleged but one crime with a maximum sentence of five years. This Court, however, noted that it is well settled that each separate use of the mails constitutes a separate offense and that consecutive sentences may be imposed for the substantive crime and conspiracy. *Id.* at 626.

In this case, that position is even stronger, because no conspiracy was charged. It avails defendants nothing that the same scheme is incorporated in each count; they were convicted of ten separate offenses based on ten different transactions. Sanders v. United States, *supra;* United States v. Austin, 10 Cir. 1972, 462 F.2d 724, 737-38; United States v. Amick, 7 Cir. 1971, 439 F.2d 351, 359; *see also* Pereira v. United States, 1954, 347 U.S. 1, 11, 74 S.Ct. 358, 98 L.Ed. 435; Johnstone v. United States, 5 Cir. 1969, 418 F.2d 1094; Milam v. United States, 5 Cir. 1963, 322 F.2d 104, 109.

V. OTHER ERRORS

Defendants challenge the court's failure to instruct on a variety of issues. However, the court specifically invited objection to its jury charge but none was made; furthermore, when either Graham or Ashdown sought special limiting instructions, the court repeatedly inquired whether its instructions "satisfied" defense counsel and was assured that they did. Thus, absent plain error, the instructions must stand. Even were we to assume there was error, which we do not, there is without question nothing in the instructions which rises to the level of plain error.

These defendants have leveled a scatter-gun attack on appeal. Other errors asserted include ineffective assistance of counsel, prosecutorial misconduct, lack of confrontation, and prosecution under the wrong section of the statute. We have considered these and find them wholly without merit, even frivolous. When the attack is closely examined, the points raised appear to be an amalgram of tenebrous theory and ingenious casuistry. These cannot be parlayed into a reversal.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 73-3020

D. C. Docket No. CR EP73 CR 254

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD HENRY ASHDOWN and
CHARLES E. GRAHAM, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas

Before BROWN, Chief Judge, and COLEMAN and DYER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 17, 1975

Issued as Mandate: MAY 6, 1975

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APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK
April 17, 1975

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

Re: 73-3020 - U.S.A. vs. Edward Henry Ashdown, Et Al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By_____
Deputy Clerk

cc: Mr. Charles E. Graham, Jr.
Mr. Edward Henry Ashdown
Mr. George Millman
Mr. Donald Re
Mr. James J. Thornton, Jr.
Mr. Ralph E. Harris
Mr. Robert G. Clark

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1424

EDWARD HENRY ASHDOWN AND
CHARLES E. GRAHAM, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Texas, petitioners were jointly convicted on ten counts of an eleven-count indictment charging securities fraud (counts 1-4, 6-8) and mail fraud (counts 9-11). Petitioner Graham was sentenced to ten years' imprisonment; petitioner Ashdown was sentenced to seven years' imprisonment.[1] The court of appeals affirmed (Pet. App. A; 509 F.2d 793).

In July 1967, petitioner Graham, the general managing partner of Graham Oil Company, obtained controlling interest in Mountain States Development Company,

[1]Each petitioner was sentenced to five years' imprisonment on count 1. On counts 2-4 and 6-8, Graham was sentenced to five years' imprisonment and Ashdown to two years' imprisonment, the terms to run concurrently with each other but consecutively to the sentences imposed on count 1. On counts 9-11, petitioners were sentenced to prison terms of five and two years respectively, to run concurrently with each other and with the sentences imposed on the other counts.

whose shares were then listed on the Salt Lake Stock Exchange, selling at a price of six or seven cents per share (Tr. 85-86). Under the agreement with Graham Oil, Mountain States was required to purchase certain of Graham Oil's properties, which were otherwise encumbered. The Mountain States shareholders were subjected to a ten cents per share assessment for the purpose of raising funds to purchase the Graham Oil properties; however, the existence of the prior liens and assignments on the properties was not disclosed to the shareholders. The assessment enabled Mountain States to raise $290,000, of which $115,000 was given to petitioner Graham (Tr. 650). Of this amount only $5,500 was applied to the debts owed on the Graham Oil properties (Tr. 650-654).

Thereafter, Graham, representing Mountain States, made two acquisitions: Laser Power Industries, a small battery company incorporated in Nevada, and a productive oil property in California known as the Jones lease. On May 14, 1968, Graham sold the Jones lease and the assets of Laser Power to the city of Deming, New Mexico, in exchange for revenue bonds in the face amount of $1,080,000, and a lease-back of the battery company's assets to a newly formed subsidiary, Laser Power Industries of New Mexico (Tr. 220-227; Gov't Exs. 41, 42). The agreement contemplated construction of a battery plant in Deming; otherwise, the revenue bonds would be valueless, since Deming's obligation on the bonds was limited to the revenue derived from lease payments made by the operating company (Tr. 227-229). The shareholders of Mountain States were made aware of the transaction with Deming but not of the limited obligation of the city on the bonds.

Petitioner Ashdown became associated with Mountain States in the fall of 1967 as the manager of its Los Angeles office. His primary responsibilities were to promote Mountain States and to seek out prospective acquisitions (Tr. 845, 851). On the day after the deal between Mountain States and Deming was closed, Ashdown and Graham, on behalf of Mountain States, transferred a controlling interest in Laser Power of New Mexico to a small California corporation, Manhattan West, in exchange for receiving the proceeds of a proposed underwriting of stock of a Canadian firm controlled by Manhattan West. This transaction was not disclosed to the Mountain States shareholders either in a shareholder letter mailed on May 28, 1968, or in the annual report distributed in late July (Tr. 704). Instead, the annual report continued to describe Laser Power and the Jones lease as assets of Mountain States.

In July 1968, Mountain States obtained certain mining claims in Honduras. Petitioners then traveled to New York City to engage a financial public relations specialist to prepare a press release concerning this acquisition. The release, issued on August 8 to 250 stockbrokers, reported that Mountain States had acquired claims independently assayed to contain $25 million in recoverable gold and silver. When the Securities and Exchange Commission thereafter required data to support this release, Graham furnished engineering reports that related to an entirely different river basin in Honduras, made no reference to silver, and did not justify the estimate of $25 million (Tr. 68, 671-672).

During this period, both petitioners publicized Mountain States, and the market value of a share in the corporation rose to more than two dollars (Tr. 245). Investors, paying constantly increasing prices for Mountain States shares, relied upon information furnished by petitioners personally, or contained in shareholders' letters and the annual

report. Trading was ordered suspended by the SEC on August 28, 1969 (Tr. 400).

Prior to the suspension, both petitioners had traded actively in the shares of Mountain States. Ashdown's sales aggregated $172,170, of which the greater part was realized after the issuance of the press release concerning the false claims in Honduras (Gov't Ex. 106). Graham's selling was done largely through nominee accounts by a Salt Lake City broker. Of $266,250 in sales made at Graham's direction, the broker remitted $153,650 directly to Graham or his agents after the issuance of the annual report in late July (Tr. 428-493). On the day before trading in Mountain States was suspended, Ashdown submitted an order to a Los Angeles broker to sell a number of his shares. The order was not received in time to be executed that day, and could not be executed at all thereafter because of the suspension. Ashdown contacted his broker and expressed his disturbance at having lost money because of the failure to execute the sale (Tr. 400-401). .

1. The petition contains no analysis of its bare claim (Pet., par. 8d, p. 2) that the evidence was insufficient to support Ashdown's conviction. The court of appeals correctly concluded (Pet. App., pp. 3-4) that there was ample evidence to show Ashdown's participation in the scheme to defraud investors in Mountain States securities and his own telephoning and mailing of information to potential investors in support of that scheme. Although Ashdown was aware of the deficiencies in the Mountain States publications, he continually spoke of the company enthusiastically to prospective investors while personally selling large quantities of the shares. The evidence amply demonstrated that Ashdown promoted the venture and made it his own. See *Pereira* v. *United States*, 347 U.S. 1, 12-13.

2. Counts 1-4 of the indictment, charging violations of 15 U.S.C. 77q, alleged as the interstate element the placing in the mail on July 26, 1968, of the 1967 annual report addressed from the El Paso, Texas, office of Mountain States to its Los Angeles office. Each count then set forth the name of an investor who thereafter had been defrauded by the mailing. Petitioners contend that each count charges the same crime, because the evidence showed that the annual reports were mailed in bulk, necessitating just one use of the mails. In view of petitioners' sentences, however, there is no need to consider this contention. See *Barnes* v. *United States*, 412 U.S. 837, 848, n.16.[2]

In any event, each count involved a separate victim of petitioners' fraud. See *United States* v. *Amick*, 439 F.2d 351, 3[illegible] (C.A. 7), certiorari denied *sub nom. Broderick* v. *United States*, 404 U.S. 823. More than one act of securities fraud was committed by the bulk mailing of numerous copies of an annual report intended for distribution to potential investors who would rely upon the misleading information contained therein to create a demand for shares of Mountain States at increasing prices.

3. Petitioners contend that the prosecutor's closing argument contained improper remarks. Petitioners made no objection at trial to the characterizations that they now assail. In any event, the prosecutor's descriptions of petitioners as swindlers and thieves, and his reference to the annual report as containing lies, are nothing more than fair comment upon the evidence or deserved responses

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[2]The sentences on counts 2-4, though concurrent with each other, run consecutively to the sentences on count 1. The sentences on counts 6-8, however, are identical to and run concurrently with those on counts 2-4. As a practical matter, therefore, the sentences on counts 2-4 can be ignored. Petitioners allege no collateral adverse consequences that will flow from the concurrent sentences on counts 2-4.

to defense counsel's attempts to portray their clients as acting in good faith under advice of counsel.[3]

4. Petitioners' claim of newly discovered evidence, in the form of a recent determination by the Internal Revenue Service that Graham's income for 1968 was only $45,691, was not presented to the court of appeals and should not be reviewed for the first time in this Court. This new information has no practical effect upon the incriminating evidence adduced at trial. It certainly would have had no effect upon the jury's conclusion that petitioners committed acts of deceit.

In any event, petitioners' claim is more appropriately addressed to the district court in the form of a collateral motion for relief. The district court can then make whatever inquiry is necessary to comply with the appropriate standards (*e.g., Moore* v. *Illinois*, 408 U.S. 786, 794-795; *United States* v. *Jacquillon*, 496 F.2d 380, 388 (C.A. 5), certiorari denied, 410 U.S. 938) and decide whether petitioners are entitled to relief from their conviction because of a belated determination by the Internal Revenue Service. Petitioners present no reasons to justify a departure from the customary and orderly course of inquiry into collateral matters.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[3]In contrast to petitioners' description of the trial as a "judicial circus" (Pet., par. 21, p. 5), see the district court's remarks following its closing charge, commending "attorneys for both sides on a well tried and well organized case. * * * It has been a pleasure gentlemen to try the case with you" (Tr. 924).